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SUBJECT: UNCITRAL Working Group on Procurement Makes Progress
Revising 1994 Model

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11. SUMMARY. At its December 7-11 meeting, the UNCITRAL Working Group on Procurement made significant progress in a second reading of the current draft revisions to the 1994 Model Law, but did not cover all of the articles. The remaining articles should be addressed at the next meeting in April 12010. Much of the discussion focused on the many available methods of procurement set forth in the text, including the conditions for their use, the procedures that apply to each, and the advantages and risks of the various methods. There is concern about the capacity of developing countries to administer effectively the methods involving dialogue/negotiation. It is not expected that a text will be ready for submission to the annual UNCITRAL Commission meeting next summer. END SUMMARY.

12. Working Group I of the United Nations Commission on International Trade Law (UNCITRAL) met December 7-11 to continue its work on revisions to the 1994 Model Law on Procurement of Goods, Construction and Services. In a second reading of the current draft, the Working Group made significant progress, but did not, as had been hoped, complete all of the articles. It completed a review of Articles 1-42 of the 66 current articles, and engaged in partial discussion of Articles 43-44 (which concern sophisticated procurement methods). In those articles that were fully reviewed, most open issues were resolved, with only a handful of matters remaining for further consideration. In a number of places, the Secretariat was asked to draft new text to reflect agreement on concepts.

13. Chapter I of the text, General Provisions (Articles 1-23), now contains a comprehensive set of provisions that apply generically to the

procurement
process notwithstanding which procurement method is used.

¶4. Examples of provisions that were discussed:
Definitions (Article 1): The definition of "socio-economic factors" was clarified. Whether to include a definition of "successful submission," and if so how it would be defined, were left open.

-Qualifications of suppliers and contractors (Article 9): The word "references" was deleted from the list of things that suppliers or contractors must demonstrate in terms of qualifications, as the text otherwise provides that the procuring entity may require suppliers or contractors to present appropriate documentary evidence of their qualifications.

-Rules concerning evaluation criteria and procedures (Article 11): In the list of evaluation criteria, "environmental characteristics" of goods or construction was added to complement "functional characteristics".

-Prequalification proceedings (Article 16): The Secretariat was requested to reconsider text on the withholding of classified information in light of the provisions on disclosure in Article 23.

-Cancellation of the procurement (Article 17): It was agreed that a procuring

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entity should incur no liability for cancellation of a procurement unless the cancellation was the consequence of irresponsible or dilatory conduct on the part of the procuring entity.

-Acceptance of the successful submission and entry into force of the procurement contract (Article 20): The applicability of standstill provisions (to allow challenges to procurement decisions) to different aspects of framework agreements was discussed, with the conclusion that this would need to be addressed further in Chapter VII on framework agreements.

¶5. Chapter II (Articles 24-29) of the text addresses methods of procurement and the conditions for their use. These methods include:

-Open tendering (generally used for goods and quantifiable services)

-Other methods not involving dialogue/negotiations: restricted tendering; request for quotations; and request for proposals without negotiation

-Methods involving dialogue/negotiations: two-state tendering; request for proposals with dialogue; request for proposals with consecutive negotiations; and competitive negotiations

-Electronic reverse auctions

-Single-source procurement

¶6. The multiple methods of procurement set forth in the text include older

methods whose usage has become less prevalent as well as newer methods, especially with regard to more complex procurement, intellectual services, etc., reflecting advances in the field of procurement. It was recalled that the various procurement methods were presented as part of a "toolbox" approach whereby enacting States could choose which methods to adopt. Some participants, however, expressed concern over the proliferation of methods. Also, representatives of the World Bank and other multilateral development banks expressed concern that developing countries may not have the capacity to administer effectively the methods involving dialogue/negotiation, and that their use would create risks with regard to corruption. It was agreed that the Guide to Enactment that would accompany the new Model Law would need to provide detailed guidance on conditions for use of the various methods and the associated risks.

17. Chapter III (Articles 30-38) concerns open tendering, which is the default method, the use of other methods requiring justification in each case. Among the issues discussed in this area was the timing of the opening of tenders. Language was retained stating that tenders shall be opened at the time of the deadline for submission of tenders set forth in the solicitation documents. It was agreed that the Guide to Enactment would address what that means in practical terms, i.e., how promptly after the expiration of the deadline the actual opening should begin.

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18. Other procurement methods not involving dialogue/negotiations are treated in Chapter IV (Articles 39-41). Regarding restricted tendering, it was agreed that procuring entities should be allowed flexibility in determining in each case how to pre-select the suppliers and contractors permitted to submit tenders, as opposed to setting forth detailed procedures for that process. With respect to request for proposals without negotiation, the working group discussed the dangers of including in the solicitation documents a reference to a maximum price (as this could naturally lead to no proposals at a lower price), and it was agreed that the Guide to Enactment should address those concerns.

19. More complex procurement methods involving dialogue/negotiations, and also single-source procurement, are found in Chapter V (Articles 42-46). In the discussion of two-stage tendering, it was considered to what extent the procuring entity was permitted to change the description of the procurement after discussions with those who submitted initial tenders. It was agreed that changes in the technical or quality characteristics of the subject matter were permissible, but that changes in the evaluation criteria should

be limited to those necessary to implement the changes in those technical or quality characteristics. The distinctions between request for proposals with dialogue and request for proposals with consecutive negotiations were examined in some detail, although discussion of those articles was not completed. Regarding the former, procedures were identified for the pre-selection of a limited number of suppliers or contractors who would be invited to submit proposals that would then be the subject of dialogue. It was agreed that the minimum number of suppliers or contractors should be left for the procuring entity to determine in any given case.

¶10. Next steps. The Working Group will convene again in April 2010 to complete the second reading of the text. That will involve first the completion of the review of procurement methods under Chapter V, including Competitive Negotiations, which is sparsely drafted and thus might be subject to misuse. That would be followed by discussion of electronic reverse auctions (Chapter VI), framework agreements (Chapter VII), and remedies in cases where the procuring entity has not complied with the law (Chapter VIII). It is not expected that a text of the revised Model Law will be ready for consideration by the UNCITRAL Commission at its annual meeting in June-July

¶2010. It remains to be seen if the Guide to Enactment could be developed over the next year or so, so that the Model Law and Guide could be submitted together to the Commission in 2011.

DAVIES